

FEDERAL MAGISTRATES COURT OF AUSTRALIA

HAJAR v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 214

MIGRATION – Review of decision of Migration Review Tribunal – time of decision criteria for sub-class 100 visa – failure to satisfy evidentiary requirements of Divisions 1.5 of the Migration Regulations 1994 – application dismissed.

Judiciary Act 1903
Migration Act 1958 (Cth)
Migration Regulations 1994

Applicant:	RABIH HAJAR
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	MLG 718 of 2005
Judgment of:	Hartnett FM
Hearing date:	13 February 2006
Delivered at:	Melbourne
Delivered on:	13 February 2006

REPRESENTATION

Counsel for the Applicant: In person

Counsel for the Respondents: Ms Koya

Solicitors for the Respondents: Phillips Fox

ORDER

- (1) The Migration Review Tribunal be joined as the second-named respondent.
- (2) The application is dismissed.
- (3) The applicant pay the costs of the first respondent fixed in the sum of \$5,000.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 718 of 2005

RABIH HAJAR
Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. Before the Court is an application filed under the *Judiciary Act 1903* and the *Migration Act 1958* (Cth) ("the Act"), seeking relief in the form of constitutional writs against the decision of the Migration Review Tribunal ("the Tribunal") which affirmed the decision of a delegate of the first respondent refusing to grant the applicant a spouse visa.
2. On 20 July 2005 orders were made providing for the applicant to file and serve any amended application and supplementary documents on or before 5 October 2005. No application or documents were filed by the applicant. The applicant attended the hearing. He appeared as a litigant in person and made oral submissions to the Court.

History

3. The applicant is a male citizen of Lebanon born on 21 July 1975 as declared in his application for migration to Australia dated 4 June 2003. I note the decision record of the Tribunal refers to a date of birth of 21 July 1975. On 26 June 2003 the applicant was granted a subclass 309 spouse visa on the basis of his marriage to Ms Fida Dakiz, the nominator. The nominator was born in Australia on 20 March 1977 and is an Australian citizen by birth.
4. The visa applicant and nominator were married at Tripoli in Lebanon on 29 May 2003. The visa applicant entered Australia on 15 July 2003. On 27 October 2003 the nominator wrote to the Department of Immigration and Multicultural Affairs ("the department") stating that the relationship between herself and her spouse had broken down and indicating her wish to withdraw her sponsorship.
5. The department wrote to the visa applicant on 31 October 2003 informing him that it had received information that his spousal relationship had ceased and invited his comments. The visa applicant did not respond to this letter and a further letter was sent by the department on 10 December 2003. The visa applicant was advised that it was likely there would be a refusal of his application for a spouse visa.
6. On 29 December 2003 and in response to a request to provide comment by the department, the visa applicant stated that he was not living with his wife and had found refuge in his wife's father's house. He requested his application be considered on compassionate grounds. He claimed to have been shocked when, three days after he arrived in Australia, his wife threw him out and indicated that she wished to reconcile with her first husband. He explained he had sold his business in Lebanon and had nothing to return to in that country.
7. On 2 February 2004 a delegate of the Minister refused to grant a class BC partner (migrant) visa. On 23 February 2004 the applicant applied to the Tribunal for review of the delegate's decision. The applicant gave oral evidence before the Tribunal on 3 May 2005. The Tribunal handed down its decision on 19 May 2005.

8. By letter dated 1 March 2005 the tribunal had sent a section 359A letter to the applicant requesting that he comment on information that his spousal relationship had ceased and that his sponsor had withdrawn her sponsorship. He was informed that such information was relevant to the Tribunal review of the delegate's decision, because it appeared that he was no longer in a genuine and continuing relationship and that he was not sponsored by his sponsoring spouse. He was informed the information was relevant to the review because it could be the reason or part of the reason for refusing his application.
9. On 7 April 2005 the Tribunal had received correspondence from the applicant wherein he claimed that he had been the victim of domestic violence and that he had been forced to divorce his wife. He claimed that his wife made him move to Australia from Lebanon and that when he arrived she became very difficult, telling him that she did not love him and she desired to reunite with her ex-husband. He claimed her family demanded that he divorce her and, further, that he buy a house for her if he wished to stay in Australia.
10. The visa applicant divorced his wife but was afraid to return to Lebanon because he said he would not -

be able to face anyone. All my friends and family will laugh at me and will make fun of me, and I have noting (sic) to do there, as I left everything and sold everything of mine in her love, I am a professional auto-electrician, was working from Honda in Lebanon running my own business, but after this where I should go.
11. At the hearing the applicant confirmed that he had moved out of the nominator's home three days after arriving in Australia, and claimed to have had genuine intentions to have a relationship with the nominator but that she was no longer interested in him upon his arrival in Australia. The Tribunal explained to the visa applicant that the visa could only be granted if he was in a genuine and continuing relationship with his wife, or if he met some other criteria under the Act, which he appeared not to meet.

The Tribunal's findings

12. Under the heading Findings and Reasons the Tribunal set out the following:
 - a) that pursuant to section 65 of the Act and in order to succeed in an application for a visa under the Regulations, it was necessary for the applicant to satisfy all of the criteria for the grant of the visa;
 - b) at the time the application was lodged, class BC contained Subclass 100 (Spouse) and 110 (Interdependency). The only subclass in respect to which any claims were advanced by the visa applicant was Subclass 100;
 - c) the relevant criteria for Subclass 100 which was required to be met at the time of decision was set out in Subdivision 100.221. There was no time-of-application criteria to be satisfied by virtue of the requirement that the visa applicant had already been assessed for and granted a Subclass 309 visa;
 - d) in order to meet clause 100.221, the applicant was required to satisfy either sub-clause (2), (2A), (3), (4), or (4A). The visa applicant was required to be the spouse of the sponsoring spouse (100.221(2)(c)).
13. Based on the applicant's evidence that he separated from his wife three days after arriving in Australia and that they had subsequently divorced, the Tribunal found the visa applicant no longer the spouse of the sponsoring spouse.
14. In light of Regulation 1.15A(3), it was evident that the applicant and nominator did not pool their finances, did not live together or share a household, and were not recognised as a couple. In fact, the visa applicant's evidence was that the nominator had married someone else. Accordingly, the Tribunal found they did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others and the relationship between them was not genuine and continuing. Based on the evidence before it, it was clear that the applicant was not in a genuine and continuing relationship with the nominator at the time of decision.

15. Accordingly, the Tribunal found the visa applicant did not satisfy subclause 100.221(2). Further, and for that reason, he was unable to satisfy subclause 100.221(2A) which also required him to be the spouse of the sponsoring spouse. There was no evidence before the tribunal to suggest that the nominator had died, so the applicant could not satisfy subclause 100.221(3).
16. To meet the requirements of subclause 100.221(4), the applicant must have:
 - a) first entered Australia on a valid subclass 309 visa;
 - b) met the requirements of subclause (2) except that the relationship must have ceased; and
 - c) after entering Australia, suffered domestic violence by the sponsoring spouse.
17. Although the applicant claimed in his statement to the Tribunal that he was the victim of domestic violence, he did not pursue that claim at the hearing. The *Migration Regulations* 1994 set out when an applicant is "taken to be a victim of domestic violence" and designate the evidence that must be provided to verify a claim of domestic violence. Regulation 1.24 sets out the requirements for the evidence that is required to establish that someone is taken to have suffered domestic violence. That requires certain evidentiary material to be placed before the Tribunal which was not submitted by the visa applicant. The tribunal therefore found the visa applicant did not meet the requirements to 100.221(4).
18. The Tribunal found, as the applicant could not satisfy any of the criteria contained in the subclauses of 100.221, he could not satisfy clause 100.221 of the criteria for the grant of the visa. The Tribunal also found the visa applicant had never held a subclass 310 (Interdependency) (Provisional) visa, and therefore could not meet the criteria for a subclass 110 (Interdependency) visa. The Tribunal had no alternative but to affirm the decision under review.

Consideration

19. The application which was filed on 14 June 2005 contains a statement of claim which recited the applicant's personal history without identifying any grounds of judicial review.
20. The statutory criteria for the granting of the subclass 100 visa are found in Schedule 2 of the *Migration Regulations 1994*. The relevant "time of decision" criteria for the subclass 100 visa are found in clause 100.22 of schedule 2 of the *Migration Regulations 1994*. "Spouse" is defined in Regulation 1.15A of the Regulations.
21. The evidence before the Tribunal was that the applicant and nominator had separated three days after his arrival in Australia and had subsequently divorced. The applicant could therefore not meet the criteria in clause 100.221(2) and 100.221(2A).
22. The domestic violence provisions allow persons applying for a permanent spouse visa to continue with their application after the breakdown of the spouse or partner relationship if they or a member of their family unit have experienced domestic violence committed by their Australian spouse or partner. Regulation 1.24 of the Regulations sets out the requirements for the evidence that is needed to establish that someone is taken to have suffered domestic violence. Certain evidentiary material is mandated. The applicant did not present before the Tribunal evidence of a claim of domestic violence as required in Regulation 1.23(1A)(b)(ii) and Regulation 1.24. The Tribunal noted that the applicant abandoned the domestic violence claim at the hearing.
23. The Tribunal's conclusions were clearly open to it on the evidence placed before it. In light of the evidentiary requirements of Division 1.5 of the *Migration Regulations 1994* the Tribunal was unable to reach any other conclusion. There is no jurisdictional error in the Tribunal's decision. The applicant was simply unable to satisfy the criteria for the grant of the visa. Accordingly, his application for review of the Tribunal decision will be dismissed.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Hartnett FM

Associate: Tracey Jones

Date: 13 February 2006